United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1233

To be argued by
Allen Lashley

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Docket No. 76-1233

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UNITED STATES OF AMERICA,

Plaintiff-Appellee

- against -

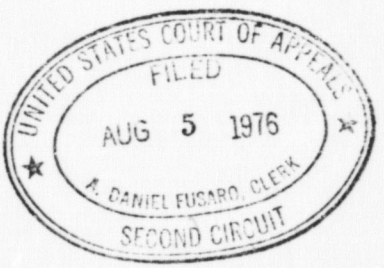
EDUARDO RUA,

Defendant-Appellant.

----------X

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW YORK

DEFENDANT-APPELLANT'S BRIEF



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APPELLANT'S BRIEF

PRELIMINARY STATEMENT

The Appellant, EDUARDO RUA, together with HECTOR GARCIA were indicted on March 9, 1976 in a superseding indictment charging them with violation of Title 18 U. S. Code, Section 659 and 2 in Count 1 and on a conspiracy charge in Count 2.

The hearing on the motion to suppress and subsequent trial commenced on March 19, 1976 before Hon. Thomas C. Platt and a jury. On March 25, 1976, the jury returned a verdict of guilty as to Rua and Garcia on both Counts.

On May 28, 1976, Judge Platt sentenced Rua to five years on Counts 1 and 2 to run concurrently and a fine of $2,500.00 on Counts 1 and 2 consecutively for a total fine of $5,000.00.

On June 2, 1976, Rua filed timely Notice of Appeal and is presently on bail pending determination of this appeal.

STATEMENT OF FACTS

On March 19, 1974, the F. B. I. received a communication that a tractor-trailer containing a quantity of Blansac Brandy, Majorska Vodka and Judge's Scotch had been hijacked in Secaucus, New Jersey on that day. (PH 4-5)*. Later that day an F. B. I. agent found the stolen tractor-trailer abandoned on the lower east side of New York containing 360 cases of vodka.

On the same day, a confidential informant telephoned F. B. I. Agent Frederick F. McMahon of the Newark, New Jersey office and informed him that information has come to his attention that some stolen vodka was scored in New York City at telephone number 388-5550 (PH 48-49). Said informant could

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Citations to "PH" refer to the preliminary hearings; "T" refers to the Transcripts of the trial.

not provide the agent with the location address of said liquor.

As to this confidential informant, Agent McMahon testifying at the hearing on the motion to suppress stated that he had worked with this informant for approximately seven years and during that period, information supplied by said informant led to arrests and convictions on more than one occasion (PH 48).

On cross-examination, Agent McMahon testified that the informant did not tell him the manner in which he learned that stolen vodka was stored in New York City (PH 50).

When asked on cross-examination for the name of any case in the last seven years that McMahon received information from the confidential informant which resulted in a conviction, the trial court sustained the Government's objection to said question (PH 51-52). Subsequently, McMahon testified that he was not prepared to give any information concerning the previous reliability of the informant (PH 55).

After receiving the telephone number from this informant, the information was relayed to the F. B. I. New York City office and it was determined that said telephone number related to a warehouse located at 187 Kent Avenue, Brooklyn, New York (PH 57); however, no attempt to obtain a search warrant of this warehouse was ever made by the F. B. I. (PH 15).

On the morning of March 20, 1974, the F. B. I. established a twenty-four hour surveillance of this warehouse which was leased to EDUARDO RUA (T 108-109). Nothing occurred until 8:45 a. m. on March 22, 1974, when a truck entered the warehouse and later left the warehouse parking across the street in front of a diner on Kent Avenue. At about 1:00 p. m. the truck departed followed by F. B. I. Agents and eventually proceeded and parked on the street in front of 406 Remsen Avenue, Brooklyn, New York at about 2:30 p. m. (PH 64). Two individuals who were inside the truck departed and F. B. I. Agents observed this truck from 2:30 p. m. until 9:00 p. m. during which time nothing occurred.

All during this period, the agents who followed the truck had no significant communications with the agents surveilling the warehouse (PH 65-66).

At about 4:00 p. m. on the same day, F. B. I. Agent Thomas W. Teel observed a 4G rental truck backing into the warehouse at 187 Kent Avenue (PH 7). The roll top door to the warehouse was then closed and the agents could not see into the warehouse nor into the truck (PH 8, 9, 31). At about 5:00 p. m. the door to the warehouse opened, the truck pulled out of the doorway and stopped in front of the sidewalk to the warehouse, whereupon the driver of the truck left the truck and closed the roll top door to the warehouse.

Six F. B. I. Agents then approached the truck which had its front door open (PH 20). Agent Teel observed a case of Blansac Brandy on the truck's front seat (PH 10), but he could not see any serial number on the case (PH 20). Agent Teel approached the truck driver, identified himself and asked him what was in this truck. The driver said he did not know. Agent Teel then asked him about the case of brandy in the front seat and the driver did not give any answer. The agent identified this driver as HECTOR GARCIA at the hearing on the motion to suppress.

Less than one minute after this conversation, other agents opened the rear doors of this truck and observed it was partially filled with Blansac Brandy (PH 10 & 11). The agents then checked the serial numbers on the brandy with their New York office and ascertained it was part of the stolen shipment from the truck hijacked in Secaucus, New Jersey. Thereupon the agents arrested Garcia (PH 23), the other individual at the scene, Nicholas Lopez (PH 12) and seized the contents of the truck.

At about 9:00 p.m. that night, the agents who had been observing the truck parked on Remsen Avenue, after learning of the arrest of Garcia, opened the truck and found it to contain vodka from the stolen shipment.

The Defendant-Appellant Rua was arrested in June 1975 (T 146) and was charged with unlawful possession of approximately 704 cases of Majorska Vodka and Blansac Brandy. On November 7, 1975, Rua was indicted and charged with violation of Title 18 U. S. Code 659 for unlawful possession of the aforesaid stolen liquor. On March 9, 1976 a superseding indictment was filed against Rua and Garcia charging them with unlawful possession of said stolen liquor and with conspiracy to possess same.

On March 19, 1976, pursuant to a motion to suppress said liquor, a hearing was held before the Trial Judge which was concluded on March 22, 1976. Judge Platt denied the motion to suppress and ruled that Rua had no standing to join in said motion made by Garcia (PH 76).

Immediately after the Judge's decision, the Government for the first time made known its intention to use a statement made by Rua at the trial (PH 89). There was no Miranda Hearing, the jury was selected immediately thereafter and the trial commenced. Rua's statement was introduced at the Trial (T 148-151) on the Government's direct case.

QUESTIONED PRESENTED

(1) Was search of trucks by agents without warrant unlawful for lack of prabable cause?

(2) Should trial judge have granted motion to suppress?

(3) Did defendant Rua have standing to join in co-defendant Garcia's motion to suppress the stolen liquor?

(4) Should trial judge have ruled Rua's statement inadmissible?

(5) Should trial judge have held a hearing to determine voluntariness of Rua's statement?

ARGUMENT

POINT I

GOVERNMENT AGENTS LACKED PROBABLE CAUSE TO SEARCH TRUCKS WITHOUT WARRANT AND THEREFORE MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED.

The Fourth Amendment to the United States Constitution outlaws "unreasonable searches". A search is unreasonable unless a warrant authorizes it with the narrow exception that the search was incident to a lawful arrest or the search was made with the consent of the defendant.

The statutory authority for Federal Agents to make arrests without a warrant is restricted to offenses committed in their presence or where they have reasonable grounds to believe that the person to be arrested has committed or is committing a felony (18 U. S. C. 3052). However, mere suspicion and even strong reason to suspect is not adequate to support probable cause. Henry v. United States, 361 U. S. 98 (1959); Johnson v. United States, 333 U. S. 10 (1948).

In Jones v. United States, 357 U. S. [illegible] (1958), the Court held that probable cause to believe that contraband is on premises does not justify circumvention of the requirements of Rule 41(a) of the Federal Rules of Criminal Procedure implementing

the Fourth Amendment which requires determination by an impartial magistrate that the circumstances justify the issuance of a search warrant. Good faith on the part of the arresting officer is not enough to constitute probable cause. Henry v. United States, supra.

It is also well established that both business establishments and automobiles as well as homes are within the protection of the Fourth Amendment. Go-Bart Importing Co. v. United States, 282 U. S. 344 (1931); Almeida-Sanchez v. United States, 413 U. S. 266 (1973). In the latter case, the Supreme Court held that there still must be probable cause for the search and warrantless searches of automobiles without probable cause violates the Fourth Amendment.

This Circuit in the recent case of United States v. Rodriguez, 532 F. 2d 834 (1976) in holding there was an illegal search, defined probable cause as existing only when an officer had knowledge of facts and circumstances sufficient to warrant a prudent man in believing that an offense is being or has been committed (p.838).

There is no dispute that where a search is conducted illegally and in violation of the Fourth Amendment, evidence obtained therefrom must be suppressed and may not be used by the Government at trial. Weeks v. United States, 232 U. S. 383 (1914). This Circuit recently held in United States

ex rel Mungo v. LaVallee, 522 F. 2d 211 (1975) in suppressing evidence unlawfully seized, that the officers conducting a search of an automobile must have reasonable or probable cause to believe they will find the instrumentality of a crime or evidence pertaining to a crime before the warrantless search is undertaken. Dyke v. Taylor Implement Manufacturing Co., 391 U. S. 216 (1968); Whitely v. Warden of Wyoming Penetentiary, 401 U. S. 560 (1971).

In the case at bar, F. B. I. Agents conducted a twenty-four hour surveillance of the warehouse at 187 Kent Avenue for two days without attempting to obtain a search warrant. The agents could not see into the warehouse, nor into either of the two trucks that pulled in and out of the warehouse on March 22, 1974. Thus, at 5:00 p. m. on that day in front of the warehouse, Agent Teel had no probable cause to arrest co-defendant Garcia and the other agents on the scene had no probable cause to open the rear door of the truck to conduct a search. In addition, Agent Teel testified at the hearing that the search of the truck was made prior to Garcia's arrest (PH 23).

Furthermore, the only information the Government Agents had in their possession concerning this warehouse was as a result of information given to Agent McMahon by a confidential informant to the effect that stolen vodka was stored in New York City at telephone number 388-5550 (PH 48, 49). The informant did not reveal either the location

of the stolen liquor or the name of the person allegedly in possession of same.

In addition, Agent McMahon refused to reveal who the informer was, the basis of his past reliability (PH 55), or the manner in which the informant learned that stolen vodka was stored in New York City (PH 50). In fact, the trial judge committed reversible error in sustaining the Government's objection to this line of questioning on cross-examination by defense counsel (PH 51, 52).

Furthermore, the Government's attorney stated on the record during the preliminary hearing on the motion to suppress that the Government is making no representation as to the informant's reliability (PH 38) and the Assistant U. S. Attorney further stated that the Government will not vouch for the reliability of the informant (PH 41).

The two leading Supreme Court cases concerning probable cause based on an informant's tip are Spinelli v. United States, 393 U. S. 410 (1969) and Aguilar v. Texas, 378 U. S. 108 (1964). In these cases the Supreme Court held that where there were no underlying circumstances to confirm information of an informant or to confirm that informant's sources were reliable, then informant's tip was not sufficient to provide basis for finding of probable cause. Also the Court held in Spinelli v. United

States, supra, that an F. B. I. surveillance and its investigation contain no suggestion of criminal conduct when taken by themselves and are not endowed by an aura of suspicion by virtue of informer's tip.

The recent Second Circuit case of United States v. Karanthos, 531 F. 2d 26 (1976) relied on the Spinelli and Aguilar cases, in declaring a search unlawful for lack of probable cause, in holding that the Government must show how the informant secured his information.

In the case at bar, Agent McMahon testified that the informant told him stolen vodka was located in New York City at telephone number 388-5550 (PH 48). Agent Teel testified that in approaching defendant Garcia on March 22, 1974 in front of the warehouse and near the truck, he saw a case of brandy (and not vodka) in the front seat of the truck (PH 10). Thus, it is clear that the Government had no probable cause to search the truck in front of the Kent Avenue warehouse without a warrant and in so doing, conducted an unlawful search. Furthermore, the Government could not use information received from the first illegal search to justify a search of the second truck on Remsen Avenue under the fruits of the poisonous tree doctrine. Wong Sun v. United States, 371 U. S. 471 (1963). As a result, the trial judge committed reversible error in denying the motion to suppress the illegally seized stolen liquor.

POINT II

THE TRIAL JUDGE COMMITTED REVERSIBLE ERROR IN RULING THAT APPELLANT RUA DID NOT HAVE STANDING TO JOIN IN CO-DEFENDANT GARCIA'S MOTION TO SUPPRESS.

The defendant Garcia brought on a motion to suppress any evidence seized from an alleged unlawful search of the trucks in question on March 22, 1974.

At the conclusion of the hearing on the motion to suppress, the trial judge in denying the motion also ruled that Rua had no standing to join in Garcia's motion (PH 76).

In the leading case on this subject, Jones v. United States, 362 U. S. 257 (1960), the Supreme Court held that where the defendant is charged with the unlawful possession of property, the charge of possession suffices to give defendant standing under the Federal Rules of Criminal Procedure 41(e) to challenge its admissibility. As stated in Jones v. United States, supra, at page 264:

> In case where the indictment itself charges possession, the defendant in a very real sense is revealed as a "person aggrieved by an unlawful search and seizure" upon a motion to suppress evidence prior to trial.

The language of the Jones case is adopted by this Circuit in the recent case of United States v. Tortorello, 533 F. 2d 809 (1976) at page 812.

In the case at bar, Rua was arrested on June 20, 1975 and charged with the unlawful possession of approximately 704 cases of stolen vodka and brandy. On November 7, 1975 he was indicted for said unlawful possession and on March 9, 1976 both Rua and Garcia were indicted in a superseding indictment wherein they were both charged with willfully and unlawfully receiving and possessing approximately 704 cases of Majorska Vodka and Blansac Brandy on or about March 22, 1974 in violation of Title 18 U. S. Code 659 and 2. A second count in the superseding indictment charged both Rua and Garcia with conspiracy to unlawfully receive and possess the aforesaid stolen liquor.

Thus, there can be no doubt that Rua had standing to join in Garcia's motion to suppress the stolen liquor which evidence was the basis for the arrest, indictment and superseding indictment. The trial judge again committed reversible error in ruling otherwise.

POINT III

THE TRIAL JUDGE COMMITTED REVERSIBLE ERROR IN ADMITTING DEFENDANT RUA'S STATEMENT INTO EVIDENCE SINCE IT WAS THE RESULT OF AN UNLAWFUL SEARCH AND ARREST.

The defendant Rua's statement admitted into evidence at the trial on the Government's direct case (T 148) was obtained by F. B. I. Agents on June 20, 1975, the date of Rua's arrest. It is submitted that the obtaining of this statement was the direct result of the primary illegality in the case at bar, to wit: the illegal search of the trucks by Government Agents on March 22, 1974. Thus, it follows that Rua's statement was inadmissible under Wong Sun v. United States, supra, as being both the fruits of the Government's illegal action and thus fruits of the poisonous tree.

In Fahy v. Connecticut, 375 U. S. 85 (1963), the Court held that a confession induced by the use of illegally seized evidence is inadmissible.

In the recent Supreme Court decision, Brown v. Illinois, 422 U. S. 590 (1975), in ruling defendant's statement inadmissible, the Court held that "Miranda" warnings by themselves do not purge the taint of an illegal arrest or search under "Wong Sun", and the burden of showing admissibility of defendant's statement rests on the prosecution.

Although in this trial, F. B. I. Agent Morrill testified that "Miranda" warnings were given to Rua prior to his statement (T 146-147), the trial judge should have conducted a hearing outside the jury's presence to determine whether Rua's statement was induced as a result of his being confronted with the illegally seized evidence (stolen liquor). Furthermore, once the statement was admitted into evidence, it had a prejudicial effect on Rua's defense and he was forced to take the stand and testify. Fahy v. Connecticut, supra.

In Silverthorn Lumber Co. v. United States, 251 U. S. 385 (1920), Justice Holmes, speaking for the Court said:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the government's own wrong conduct cannot be used by it in the way proposed." (251 U. S. at 392) (Emphasis added).

This Circuit in the recent case of United States v. Lucchetti, 533 F. 2d 28 (1976) in discussing the admissibility of defendant's statements, reaffirmed the exclusionary rule enunciated in Wong Sun v. United States, supra, and in citing Silverthorn Lumber Co. v. United States, supra, said at page 38

that the exclusionary rule has been applied in cases where primary illegality is connected with evidence gathering or investigative process.

Thus, the trial judge was under a duty to conduct a hearing outside the presence of the jury to determine whether Rua's statement was admissible into evidence. Furthermore, even though defense counsel failed to object to the admission of said statement at the trial, it is submitted that the trial judge committed plain error under Rule 52(b) of the Federal Rules of Criminal Procedure in allowing Rua's statement into evidence.

In addition thereto, the trial judge should have specifically instructed the jury at the time of the statement's admission into evidence as to the weight it should be given by the jury in their deliberation. At the time, the trial judge should have also specifically instructed the jury as to the voluntariness of said statement.

POINT IV

THE TRIAL JUDGE COMMITTED REVERSIBLE ERROR IN ADMITTING RUA'S STATEMENT INTO EVIDENCE WITHOUT FIRST DETERMINING THE VOLUNTARINESS OF STATEMENT OUT OF JURY'S PRESENCE.

18 U. S. C. 3501(a), which relates to the admissibility of confessions in Federal criminal trials provides as follows:

> In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issues as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

In the case at bar, Assistant U. S. Attorney Gary Woodfield first notified both the Court and defense counsel immediately prior to the selection of the jury and the trial, and immediately after the motion to suppress hearing, that the Government now intended to introduce into evidence at the trial a statement made by the defendant Rua on the date of

his arrest (PH 89):

> Mr. Woodfield: "Your Honor, there is one additional matter. To be very brief with it, the Government does intend to introduce a statement made by the defendant, Rua, and of course I will advise counsel and turn the statements over to the defense counsel far in advance of trial. While there hasn't been any specific motion to suppress, I think he is entitled to determine whether or not the defendant was adequately advised of his rights at the time of the arrest, and I am able to produce that witness, which is Agent Morrill."

Thus immediately prior to the trial, Rua learns for the first time that the Government has a statement made by him and intends to introduce the statement at trial. Instead of conducting a "Miranda" hearing to determine the voluntariness of this statement, the trial judge immediately selects the jury and the trial is commenced on March 22, 1976. (PH 90).

On March 23, 1976 Rua's statement is admitted into evidence and read to the jury (T 148-151). On the same day the Government rests and the trial judge denies Rua's motion to dismiss the indictment for lack of a prima facie case (T 164).

It is submitted that the trial judge committed reversible error in failing to conduct the required hearing pursuant to 18 U. S. C. 3501(a), especially where the prosecutor requested this hearing and had his witness available.

In United States v. Barry, 518 F. 2d 342 (1975) this Court in reversing the conviction, held that the failure to charge on the specific issue of the voluntariness of defendant's statement is plain error under Rule 52(b) of the Federal Rules of Criminal Procedure. Chief Judge Kaufman further stated that the jury must be instructed to give defendant's statement the weight they feel it warrants under all the circumstances and that 18 U. S. Code 3501(a) requires a specific charge on the issue of voluntariness even though the defendant claims his statement was not inculpatory, for the jury could have been substantially swayed by the trial judge's error.

In the case at bar, defendant Rua and his counsel also claim that Rua's statement is not inculpatory and no objection is made to its introduction into evidence. It is submitted that the trial judge in his charge made no specific reference to Rua's statement (T421-422) and thus his charge in this respect is inadequate under United States v. Barry, supra. Furthermore, even though Rua's statement was admitted into evidence without objection, the trial judge committed plain error in admitting Rua's statement since it affected a substantial right of the defendant.

Finally, in the interests of justice, the trial judge should have dismissed the indictment against Rua at the end of the Government's case for lack of a prima facie case. Furthermore,

at the end of the entire case, the evidence against Rua was so totally insufficient to substantiate a guilty verdict, that the trial court's denial of Rua's motion for a judgment of acquittal was reversible error.

CONCLUSION

FOR ALL OF THE ABOVE REASONS, THE JUDGMENT OF CONVICTION SHOULD BE REVERSED, AND THE INDICTMENT SHOULD BE DISMISSED; IN THE ALTERNATIVE, DEFENDANT RUA SHOULD BE GRANTED A NEW TRIAL.

Respectfully submitted,

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